International Longshoremen's Association, Local 1235, AFL–CIO *and* Naporano Iron & Metal Company. Case 22–CD–591

March 11, 1992

DECISION AND ORDER QUASHING NOTICE OF HEARING

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed August 1, 1991, by Naporano Iron & Metal Company (Naporano), the Employer, alleging that the Respondent, International Longshoremen's Association, Local 1235, AFL–CIO (ILA Local 1235), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Laborers International Union of North America, Local 734, AFL–CIO (Laborers Local 734). The hearing was held on October 9, 10, 16, and 17, 1991,[1] before Hearing Officer Nicholas H. Lewis.

The National Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Naporano, a New Jersey corporation, is engaged in the business of receiving, processing, and recycling scrap metal and iron at its facility in Newark, New Jersey. During the 12 months preceding the hearing, Naporano sold and shipped recycled metal valued in excess of $50,000 directly to customers located outside the State of New Jersey and the United States. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that ILA Local 1235 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

In the mid-1970s, Naporano began to export scrap metal by sea from Port Newark. As part of the export process, Naporano's employees, represented by Laborers Local 734,[2] processed scrap iron at its inland facilities and then transported the processed scrap iron by truck to the marine terminal in Port Newark, where Naporano leased berth spaces from the Port Authority of New York and New Jersey. At these berths Naporano employees arranged and stockpiled the scrap iron in preparation for loading on oceangoing vessels. Until the present dispute, Naporano had contracted the ship loading to Weeks Stevedoring Company (Weeks), which had employed members of ILA Local 1235 to load the ships and members of the Operating Engineers to operate the cranes used in loading.[3]

At midnight on June 30, 1991, the Operating Engineers went on strike against the port's bulk stevedoring companies, including Weeks, on the expiration of their collective-bargaining agreements. Toward the middle of July, Ted Weeks, one of the principals of Weeks, told Andrew Naporano, senior vice president of Naporano, that the negotiations with the Operating Engineers were at an impasse. Following the conversation with Ted Weeks, Andrew Naporano decided that Naporano would use its own employees to load its incoming ship, which was scheduled to arrive near the end of July or early August. The Operating Engineers' strike ended on July 29.

On July 30, having learned that a ship was scheduled to dock the next day, Andrew Naporano informed August Vergallito, the president of Laborers Local 734, that Naporano employees represented by Local 734 would be loading the incoming ship.[4] Early in the morning of July 31, Naporano's ship docked and Naporano, rather than renewing its oral contract with Weeks, began loading the ship with its own employees represented by Laborers Local 734. At about the same time as the loading began, Albert Cernadas, the president of ILA Local 1235, ordered ILA Local 1235 members to picket the worksite. Cernadas also telephoned Vergallito on July 31 and asked him if he was aware that Laborers Local 734 members were loading Naporano's ship. Vergallito replied that he did not know that his members were loading the ship, but that if that were the case, he would send Naporano a telegram telling him that Laborers Local 734 would ask its members to stop performing the work.

The next day, August 1, Naporano filed the instant unfair labor practice charge with the Regional Director alleging that ILA Local 1235's picketing violated Section 8(b)(4)(D).

[1] All dates are 1991 unless otherwise indicated.

[2] Since September 24, 1953, Naporano has had collective-bargaining agreements with Laborers Local 734 covering its production and maintenance employees.

[3] Since 1986 or 1987, pursuant to a settlement agreement approved by the Regional Director for Region 22 of the Board, ILA Local 1235 members employed by Weeks and other bulk stevedoring companies have been selected from a formalized bulk cargo referral list which currently consists of approximately 25 bulk cargo longshoremen and is known as ''Charlie Dino's Gang.'' All bulk cargo in Port Newark is handled exclusively by Charlie Dino's Gang.

[4] Naporano testified that Vergallito indicated in this conversation that its members would perform the loading work. In his deposition, Vergallito disputed this version of the conversation and stated that he was deliberately evasive in order to discover what was happening. For the purposes of this decision the substance of this telephone conversation, beyond the above notification to Vergallito, is immaterial.

On August 2, Vergallito and Laborers Local 734's business agent, Ronald Sodora, sent Naporano a telegram which stated:

> There has been a complaint filed with the International Union that Local 734 members are alledgedly [sic] infringing on the work of the Longshoreman [sic] and Operating Engineers. If this is a true fact [sic] Local 734 will not tolerate their members doing the work of the Longshoreman [sic] and Operating Engineers. We will instruct our members to respect any legitimate pickett [sic].

The same day Naporano responded by facsimile letter which, in pertinent part, stated:

> We expect Local 734 bargaining unit employees to do all work assigned by Naporano. In this regard, you are reminded that our contract with Local 734 has a very specific no-strike clause which prohibits, among other things, work stoppages and sympathy strikes.
>
> Please be advised that any sympathy strike or work stoppage by Local 734 bargaining unit employees will be in violation of our collective bargaining agreement and will subject employees to discipline up to an [sic] including discharge. We also understand that a representative of Local 734 has directed bargaining unit employees not to report to work. Please be further advised that any such conduct will be deemed a violation of our collective bargaining agreement and we will hold Local 734 strictly accountable to Naporano for consequential and punitive damages flowing [from] Local 734's improper and unlawful conduct.

On August 9, the Regional Director filed for an injunction in Federal district court pursuant to Section 10(l). On September 6, at the Federal district court hearing, counsel for Laborers Local 734 unequivocally stated that Laborers Local 734 made no claim to the loading work. Based on this disclaimer and the August 2 letter from Naporano to Laborers Local 734, the court found that Laborers Local 734 ''makes no claim to perform the subject work,'' and ''that they are doing so only as a result of the charging party's compulsion, direction and threat of legal action if they do not perform.'' The court denied the request for injunctive relief.

At the instant 10(k) hearing, counsel for Laborers Local 734 stated that ''Local 734 does not now claim, nor has it ever claimed any of the work that has historically been performed on Naporano premises by ILA represented employees,'' and ''that although Local 734 represented employees are apparently doing work that had historically been performed by employees represented by the ILA Local here, the Local 734 represented employees are doing so under compulsion . . . [from Naporano's threats] to discipline or even to discharge any employee who refused to do the work that was assigned to the employee . . . [and] to bring a lawsuit against Local 734 and seek punitive and consequential damages.'' He further stated that Local 734 does not want ''any part of a dispute that apparently exists between Naporano and the ILA.'' In a deposition introduced into evidence at the 10(k) hearing, Vergallito stated that Laborers Local 734 did not claim the disputed work. Sodora testified that he never claimed the disputed work on behalf of Laborers Local 734. Finally, in its brief to the Board, Laborers Local 734 again disclaimed the disputed work.

B. *Work in Dispute*

The disputed work involves loading scrap metal onto ships docked at berths in Port Newark, New Jersey. The loading tasks include tying up and securing ships that are docking, positioning ships with respect to scrap metal waiting to be loaded and with respect to the cranes that are used to load the scrap metal, repositioning cranes in the course of loading a ship, assisting crane operators in the placement of scrap in the hold, ensuring that scrap metal placed in the hold is evenly distributed, and clearing scrap metal that has fallen onto the deck of the ship.

C. *Contentions of the Parties*

The Respondent and Laborers Local 734 contend that no jurisdictional dispute exists and that the notice of hearing should be quashed because Laborers Local 734 has disclaimed the work and that the dispute is between Naporano and the Respondent. The Respondent further contends that no jurisdictional dispute exists because the Employer created the dispute by its own actions.

The Employer contends that Laborers Local 734 has not effectively disclaimed the work because it lacks the legal capacity to disclaim the disputed work in light of its collective-bargaining agreement which covers the work in dispute. The Employer further contends that even if Laborers Local 734 had the legal capacity to disclaim the disputed work, the facts do not support an effective disclaimer. Finally, the Employer contends that ILA Local 1235's conduct lacks a valid work preservation objective and that the work in question should be awarded to its employees represented by Laborers Local 734.

D. *Applicability of the Statute*

Before the Board may proceed to a determination of dispute under Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. For the Board to find reasonable cause, there must be (1) a genuine dis-

pute, (2) proscribed activity under Section 8(b)(4)(D)(i) or (ii), and (3) an objective to force the Employer to reassign the work. *Operating Engineers Local 925 (Bradshaw Industrial Coatings)*, 264 NLRB 962, 964 (1982).

A genuine jurisdictional dispute under Section 8(b)(4)(D) ''is a dispute between two or more groups of employees over which is entitled to do certain work for an employer.'' *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 579 (1961). No dispute exists when a party effectively disclaims the disputed work. *Bradshaw Industrial Coatings*, 264 NLRB at 964. Independent conduct by individual members of a union will not vitiate the disclaimer when the totality of the circumstances indicates that the disclaimer was not equivocal. *Teamsters Local 85 (U.C. Moving Services)*, 236 NLRB 157, 158–159 (1978).

On the basis of the entire record, we find that Laborers Local 734 has effectively disclaimed the disputed work assignment. From the beginning of the dispute and at each subsequent stage of the dispute Laborers Local 734 has unequivocally and unconditionally disclaimed the disputed work. Although Local 734 members continued to perform the disputed work, such action flowed directly from the Employer's threat to Local 734 to discipline or discharge any of its employees who did not report to work and to seek damages against Local 734 for failure to perform the disputed work. Under these circumstances, we do not find that performance of the disputed work by Local 734 members vitiated the disclaimer by Local 734. *U.C. Moving Services*, 236 NLRB at 158–159.

We further find no merit in the Employer's contention that Laborers Local 734 lacks the legal capacity to disclaim the disputed work ''because to do so would involve a breach of their collective-bargaining contract.'' *Longshoremen ILA Local 1291 (Pocahontas Steamship)*, 152 NLRB 676, 680 (1965). The instant case is readily distinguishable from *Pocahontas*. There, the disputed work involved ''hatch and beam'' work, which was specifically covered in the employer's collective-bargaining agreement with the union that performed the work. Here, in contrast, Laborers Local 734's contract covers the broad area of ''production and maintenance,'' without specific mention of the disputed work. Moreover, in this case, unlike *Pocahontas*, Laborers Local 734 members were not performing the work prior to the dispute and thus were not seeking, by means of the disclaimer, to stop performing one of their regular duties without losing any pay.

For the above reasons, we conclude that there is no reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated and, therefore, we shall quash the notice of hearing.

ORDER

The notice of hearing issued in this case is quashed.